Supreme Court, U.S.
FILED

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No.

In the Supreme Court of the United States

SHANNON A. DARDAR
Petitioner,

v.

JOHN E. POTTER, POSTMASTER GENERAL,
UNITED STATES POSTAL SERVICE;
UNITED STATES OF AMERICA
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether a contract mail carrier of the United States Postal Service is an independent contractor for purposes of Title VII, 42 U.S.C. Section 2000e-16 and therefore lacks standing to bring a claim of sexual harassment.

2. Whether a claim for intentional infliction of emotional distress resulting from conduct constituting sexual harassment that could also be the basis for a claim of assault, battery, and/ or tortious interference with a contract is excepted by the Federal Tort Claims Act, 28 U.S.C. §2680(h).

3. Whether a contract mail carrier of the United States Postal Service is left with no remedy for sexual harassment because as an independent contractor she lacks standing under Title VII because she is not an "employee" and she is also precluded from proceeding under the Federal Tort Claims Act because the conduct which constituted the sexual harassment could be classified as an assault, battery or intentional interference with a contract.

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BASIS FOR JURISDICTION

The judgment of the Fifth Circuit was entered on September 13, 2004. The jurisdiction of this Court is conferred by 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES

42 U.S.C. §2000e-16. Employment by Federal Government:

See Appendix.

28 U.S.C. §1346. United States as defendant:

See Appendix.

28 U.S.C. §2674. Liability of United States:

See Appendix.

28 U.S.C. §2680. Exceptions:

See Appendix.

STATEMENT OF THE CASE

Basis for Jurisdiction in the District Court:

The district court had jurisdiction in this matter pursuant to 28 U.S.C. §1331, 28 U.S.C. §1339, and 42 U.S.C. §2000e(5).

Basis for Jurisdiction in the Court of Appeals:

The District Court issued a final judgment on March 4, 2004. The final judgment was entered on March 5, 2004. Petitioner/Appellant filed a Notice of Appeal with the District Court appealing this matter to the Court of Appeals on March 31, 2004. The Fifth Circuit entered its decision on September 13, 2004.

Facts:

Shannon Dardar is a female mail contract carrier of the United States Postal Service since October 10,1998, at the Mandeville, Louisiana #1 St. Ann Drive Post Office. At all relevant times herein, Ronnie Webb was supervisor of Carriers and Acting Postmaster at the Mandeville, Louisiana #1 St. Ann Drive Post Office and as such was Dardar's supervisor. Webb began harassing Dardar in early September 1998 and continued to harass Dardar until Webb was relocated to another post office on September 1, 2001.

Soon after Dardar put a bid in for a permanent contract in September 1998, Webb started making sexual comments to her including but not limited to:
"When are you going to give me some of that Pussy"; "You can service me in that position"; "If you give me some I will make sure you get your pay" (back pay that was owed); Webb told Dardar that when she finished putting her mileage in her computer at her home "you can bring it to my house; I am going to be there all by myself"; when Dardar asked Webb if he wanted the handwritten line of travel and mileage Webb said "No you know what I want"; after a tire had blown up in Dardar's face Webb told Dardar: "now why don't

you give me some because you won't be able to get it from anyone else"; "you have to quit keeping that all to yourself"; "I would like to service you"; "you could give me a blow job"; "I could get you from behind" .

In addition to the verbal comments Webb also repeatedly made grabbing actions like he was going to grab Dardar's breasts. Every time Webb was working he would stare at Dardar. Webb would stand at the stand up desk and stare at Dardar. Dardar would tell Webb to stop staring at her. Webb would make suggestive facial expressions like licking his lips or winking. Webb would rub his hands together while staring at Dardar. Webb would grab his testicles while staring at Dardar or he would put his hand in his pocket and play with himself. On one occasion Webb came into Dardar's case (work space) and grabbed Dardar by her arm and told her that she was going to get half of what the post office owed her. If Dardar would bend down to pick up her flats or squat to case the mail Webb would make sexual comments including but not limited to: "You can service me in that position."

On August 28, 2001 Webb made grabbing actions like he was going to grab Dardar's breasts. Dardar had to back up or Webb would have grabbed her. At all times Dardar did not do anything to provoke or encourage Webb. Every time Webb made sexual comments to Dardar, Dardar repeatedly told Webb to get away from her. Dardar told Webb that she was going to report his harassment; Webb told Dardar that he would fire her and that she would have to pay the contract back.

Webb complained about how Dardar did the maps and mileage when she was trying to correct the mileage that

she had been getting. While Webb was Dardar's supervisor Dardar's mileage rate was reduced from $2.78466 per mile to $2.51203 per mile. On several occasions Webb threatened to fire Dardar and told her that she would have to pay the contract back. Webb refused to correct the mileage on Dardar's contract because Dardar refused his sexual advances.

Dardar complained to higher management officials including: Charlie Spizally, Postmaster about Webb cornering her in her letter case, grabbing her arm, and sexually harassing her. Dardar explained to the Postmaster about the sexual harassment Webb had been doing to her since she started. Dardar also complained on numerous occasions to: John Parker, Shop Steward; Jay Falcker, Shop Steward; Kurt Bodenheimer, Shop Steward; Brad Wallace, Supervisor of Clerks (now Postmaster at Angie Post Office) and others.

Defendant did not take any reasonable steps to rectify the offensive conduct. Dardar sent a certified letter to the Postmaster, Charlie Spizally on August 31, 2001 complaining about the harassment.

The harassment by Webb caused Dardar emotional distress, humiliation, and embarrassment. Dardar did not want to go to work. The harassment effected how well Dardar was able to perform her work. Dardar made more mistakes casing and delivering the mail because she felt emotional distress over being sexually harassed. Dardar was always worried that she would get fired and have to pay the contract back. Dardar had trouble sleeping. Dardar had nightmares.

After the first incident of sexual harassment Dardar stopped wearing shorts, sleeveless shirts or perfume even

though these things are permitted. Dardar started wearing a cap and wearing her hair pulled back in a ponytail. Other women were sexually harassed by Webb including: Julia Kenny and Denise Smith.

Dardar filed an EEOC complaint and an administrative claim under the Federal Tort Claims Act complaining of Webb's actions. The EEOC complaint was dismissed because the EEOC held that Dardar did not have standing under Title VII. The administrative claim under the Federal Tort Claims Act was denied because there was no waiver of sovereign immunity for assault or battery.

REASONS FOR GRANTING PETITION

TITLE VII:

This Honorable Court should grant this petition because the ruling by the Fifth Circuit leaves a contract mail carrier of the United States Postal Service without any remedy to redress sexual harassment on the job while other mail carriers of the United States Postal Service enjoy all of the protections of Title VII.

The District Court dismissed Dardar's sexual harassment claim under Title VII. The District Court held that Dardar as a contract carrier of the United States Postal Service is an independent contractor for the purposes of Title VII and therefore lacks standing to bring a Title VII claim for sexual harassment. In affirming the judgment of the District Court, the Fifth Circuit found that Dardar, a contract mail

carrier, does not have standing to sue under Title VII, 42 U.S.c. 2000(e), because she is an independent contractor.

According to the Fifth Circuit ruling a contract mail carrier of the United State Postal Service has no standing under Title VII because a contract mail carrier is not an employee. The employee mail carriers and the contract mail carriers of the United States Postal Service perform the same job functions; however, only the employee mail carriers have standing under Title VII for a claim of sexual harassment.

FEDERAL TORT CLAIMS ACT:

The District Court also dismissed Dardar's alternative theory that the sexual harassment conduct violated the Federal Tort Claims Act, 28 U.S.C. sections 1346, 2401 and 2671 et seq. The District Court held that" the waiver of immunity contained in the FTCA does not apply to conduct which, in essence, constitutes the claims of assault, battery, or interference with contract rights."[1]

The Fifth Circuit held that Dardar's claims for intentional infliction of emotional distress are barred by the sovereign immunity afforded to the United States under the Federal Tort Claims Act, 28 U.S.C. §2680.

The ruling of the Fifth Circuit leaves a contract mail carrier or any other independent contractor with the United

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[1] The District court stated that Dardar did not name the United States as a defendant as required by the Federal Tort Claims Act; however, when Dardar amended her complaint to include a cause of action under the Federal Tort Claims Act she did also amend to specifically name the United States as a defendant as required by the Federal Tort Claims Act.

States without any remedy for sexual harassment under either Title VII or the Federal Tort Claims Act.

Furthemore, the decision in this case is contrary to an earlier decision of the Fifth Circuit in Truman v. U.S., 26 F.3d 592, 594 (5th Cir. 1994).

> Through the enactment of the FTCA, the government has generally waived its sovereign immunity from tort liability for the negligent or wrongful acts or omissions of its agents who act within the scope of their employment.
>
> Specifically, the FTCA allows the government to be held liable in tort for any negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

Truman v. U.S., 26 F.3d 592, 594 (5th Cir. 1994).

The government has retained its sovereign immunity for" any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights." 28 U.S.C.. Section 2680(h). The Fifth Circuit in Truman recognized that the FTCA bars a claim based on conduct that constitutes a tort listed in section 2680(h), even though that conduct may also constitute another tort not listed in section 2680(h). Truman v. U.S., 26 F.3d 592, 594 (5th Cir. 1994); however, the Fifth Circuit in Truman stated:

> In contrast, if a plaintiff bases a claim on conduct that does not constitute a claim" arising out of" a tort specified in section 2680(h), then the plaintiff's suit is not barred. Even in cases in which the facts alleged in the complaint have two distinct aspects that may give rise to two similar torts, 'the partial overlap between ... two tort actions does not support the conclusion that if one is excepted under the Tort Claims Act, the other must be as well. Neither the language no[r] history of the Act suggests that when one aspect of the Government's conduct is not actionable [because it constitutes a tort enumerated in section 2680(h)], a claimant is barred from pursuing a distinct claim arising out of other aspects of the Government's conduct." Block v. Neal, 460 U.S. 289,298, 103 S.Ct. 1089, 1094, 75 L.Ed.2d 67 (1983). So long as some aspect of the conduct upon which a plaintiff bases a tort claim does not constitute a tort listed in section 2680(H), the suit is not barred.

Truman v. U.S., 26 F.3d 592, 595 (5th Cir. 1994) emphasis added.

The plaintiff in Truman alleged an extensive pattern of offensive conduct much like the offensive conduct alleged by Darder. "The district court dismissed Truman's suit holding that Truman's claims were barred by section 2680(h) because they arose out of an assault or a battery or constituted slander." Id. At 595. The Fifth Circuit in Truman v. U.S., 26 F.3d 592, 595 (5th Cir. 1994) held that "the district court erred when it dismissed Truman's suit. The conduct alleged in Truman's complaint can fairly be read to state a claim for intentional infliction of emotional distress - not a claim for

assault, battery, or slander. And, a claim for intentional infliction of emotional distress based on the conduct described in Truman's complaint is not barred by an exception to the FTCA." Truman v. U.S., 26 F.3d 592, 595 (5th Cir. 1994).

Truman complained of sexual insults, comments, innuendos which caused her to suffer mental anguish, anxiety, embarrassment, and humiliation. The Fifth Circuit found that Truman had referred in a conclusory way to a claim for' sexual harassment' and that based on the allegations of sexual harassment the court found the existence of a claim for intentional infliction of emotional distress. The Fifth Circuit held that Truman's claim was for intentional infliction of emotional distress and not for assault, battery or slander and therefore, was not excluded from the reach of the Federal Tort Claims Act. The court acknowledged in footnote 1 that Truman's allegation that Whittaker had" grabbed at" Truman's crotch area could be construed to raise an assault claim. Truman v. U.S., 26 F.3d 592, 595 (5th Cir. 1994).

The conduct alleged by Truman in her complaint is similar to the conduct alleged by Dardar in her complaint. Dardar has alleged with particularity sexual comments and requests for sexual favors made by her supervisor, Ronnie Webb. Dardar has alleged that she suffered emotional distress, humiliation and embarrassment because of sexual harassment. Dardar has specifically made a claim for intentional infliction of emotional distress. However the Fifth Circuit in this case dismissed Dardar's claim holding that "her claims for intentional infliction of emotional distress are barred by the sovereign immunity afforded to the United States of America under the Federal Tort Claims Act.

28 U.S.C. §2680.

The Fifth Circuit in Truman examined the elements of assault, battery and slander and decided that they were distinct from the elements of intentional infliction of emotional distress. The Fifth Circuit in Truman went on to say that

> the goals of these torts are different. Intentional infliction of emotional distress is designed to protect a person's normal and equable state of mind. Assault and battery are designed to protect people from harmful or offensive contact and from the apprehension of such contact;...Intentional infliction of emotional distress may have similarities with assault, battery, and slander, but it does not have an indentity sufficient for one to conclude that it is symbiotic with assault, battery, or slander. The fact that an intentional infliction of emotional distress claim guards against severe emotional distress goes far to negate the possibility that such a claim has an identity with either an assault, or a battery, or slander.
>
> In addition to the foregoing analysis, we recognize that in section 2680(h), Congress determined to except certain torts from the FTCA's general waiver of sovereign immunity. Intentional Infliction of emotional distress was not included among these enumerated torts. *Expressio unius est exclusio alterius*. Given the specific exceptions enumerated in section 2680(h), the government cannot claim intentional infliction of emotional distress was also ex-communicated from the FTCA.

Truman v. U.S., 26 F.3d 592, 597 (5th Cir. 1994).

The Fifth Circuit summary ruling in this case did not make any distinction between the sexual harassment claim in Truman and the sexual harassment claim in this case. The Fifth Circuit merely stated: "Similarly, we find her claims for intentional infliction of emotional distress are barred by the sovereign immunity afforded to the United States of America under the Federal Tort Claims Act. 28 U.S.C. §2680." The Fifth Circuit failed to make any mention of its earlier decision in Truman and failed to give any reason why their decision in this case is contrary to their decision in Truman v. U.S., 26 F.3d 592, 597 (5th Cir. 1994).

This Honorable Court should grant this Petition to clarify whether a claim for sexual harassment by a contract worker of the United States of America is covered by the Federal Tort Claims Act as the Fifth Circuit held in Truman v. U.S., 26 F.3d 592, 597 (5th Cir. 1994) or excluded from coverage under the Federal Tort Claims Act as the Fifth Circuit has ruled in this case without distinguishing this case from Truman.[2]

[2] The District Court dismissed a breach of contract claim holding that the Tucker Act deprives this court of jurisdiction because Dardar has incurred damages of $50,000.00; however, Dardar has not made any breach of contract claim Dardar has merely alleged that part of the harassment by Webb was to threaten Dardar regarding her contract. Dardar has alleged that Webb refused to correct the mileage on Dardar's contract because Dardar refused Webb's sexual advances. First Amended Complaint Paragraph 24. R. pg. 128. Webb's refusal to correct the mileage was part of the sexual harassment claim, quid pro quo sexual harassment. The damages resulting from Webb's refusal to correct the mileage were economic damages resulting from the sexual harassment. The sexual harassment in this case was both hostile work environment and quid pro quo sexual harassment. Dardar has not made a claim for breach of contract in this suit.

CONCLUSION

The Petition for Writ of Certiorari should be granted to clarify for the Courts of Appeal whether an independent contractor of the United State Postal Service or other federal agency has a cause of action for sexual harassment under either Title VII or the Federal Tort Claims Act.

Respectfully submitted,

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APPENDIX A

28 U.S.C. §2674. Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages.

If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages, measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

With respect to any claim under this chapter, the United States shall be entitled to assert any defense based upon judicial or legislative immunity which otherwise would have been available to the employee of the United States whose act or omission gave rise to the claim, as well as any other defenses to which the United States is entitled.

With respect to any claim to which this section applies, the Tennessee Valley Authority shall be entitled to assert any defense with otherwise would have been available to the employee based upon judicial or legislative immunity, which otherwise would have been available to the employee of the Tennessee Valley Authority whose act or omission gave rise to the claim as well as any other defenses to which the Tennessee Valley Authority is entitled under this chapter.

28 U.S.C. §2680. Exceptions.

The provisions of this chapter and section 1346(b) of this title shall not apply to -

(a) Any claim based upon an act or omission of an employee of the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

(b) Any claim arising out of the loss, miscarriage, or negligent transmission of letters or postal matter.

(c) Any claim arising in respect of the assessment or collection of any tax or customs duty, or the detention of any goods, merchandise, or other property by any officer of customs or excise or any other law enforcement officer, except that the provisions of this chapter and section 1346 (b) of this title apply to any claim based on injury or loss of goods, merchandise, or other property, while in the possession of any officer of customs or excise or any other law enforcement officer, if -

(1) the property was seized for the purpose of forfeiture under any provision of Federal law providing for the forfeiture of property other than as a sentence imposed upon conviction of a criminal offense;

(2) the interest of the claimant was not forfeited;

(3) the interest of the claimant was not remitted or mitigated (if the property was subject to forfeiture); and

(4) the claimant was not convicted of a crime for which the interest of the claimant in the property was subject to forfeiture under a Federal criminal forfeiture law. [fn1]

(d) Any claim for which a remedy is provided by sections 741-752, 781-790 of Title 46, relating to claims or suits in admiralty against the United States.

(e) Any claim arising out of an act or omission of any employee of the Government in administering the provisions of sections 1-31 of Title 50, Appendix.

(f) Any claim for damages caused by the imposition or establishment of a quarantine by the United States.

(g) Repealed. Sept. 26, 1950, ch. 1049, Sec. 13 (5), 64 Stat. 1043.)

(h) Any claim arising out of assault, battery, false imprisonment, false arrest, malicious prosecution, abuse of process, libel, slander, misrepresentation, deceit, or interference with contract rights: Provided, That, with regard to acts or omissions of investigative or law enforcement officers of the United States Government, the provisions of this chapter and section 1346 (b) of this title shall apply to any claim arising, on or after the date of the enactment of this proviso, out of assault, battery, false imprisonment, false arrest, abuse of process, or malicious prosecution. For the purpose of this subsection, "investigative or law enforcement officer" means any officer of the United States who is empowered by law to

execute searches, to seize evidence, or to make arrests for violations of Federal law.

(i) Any claim for damages caused by the fiscal operations of the Treasury or by the regulation of the monetary system.

(j) Any claim arising out of the combatant activities of the military or naval forces, or the Coast Guard, during time of war.

(k) Any claim arising in a foreign country.

(l) Any claim arising from the activities of the Tennessee Valley Authority.

(m) Any claim arising from the activities of the Panama Canal Company.

(n) Any claim arising from the activities of a Federal land bank, a Federal intermediate credit bank, or a bank for cooperatives.

[fn1] So in original.

42 U.S.C. §2000e-16. Employment by Federal Government

(a) Discriminatory practices prohibited; employees or applicants for employment subject to coverage

All personnel actions affecting employees or applicants for employment (except with regard to aliens employed outside the limits of the United States) in military

departments as defined in section 102 of title 5, in executive agencies as defined in section 105 of title 5 (including employees and applicants for employment who are paid from nonappropriated funds), in the United States Postal Service and the Postal Rate Commission, in those units of the Government of the District of Columbia having positions in the competitive service, and in those units of the judicial branch of the Federal Government having positions in the competitive service, in the Smithsonian Institution, and in the Government Printing Office, the General Accounting Office, and the Library of Congress shall be made free from any discrimination based on race, color, religion, sex, or national origin.

(b) Equal Employment Opportunity Commission; enforcement powers; issuance of rules, regulations, etc.; annual review and approval of national and regional equal employment opportunity plans; review and evaluation of equal employment opportunity programs and publication of progress reports; consultations with interested parties; compliance with rules, regulations, etc.; contents of national and regional equal employment opportunity plans; authority of Librarian of Congress

Except as otherwise provided in this subsection, the Equal Employment Opportunity Commission shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies, including reinstatement or hiring of employees with or without back pay, as will effectuate the policies of this section, and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section. The Equal Employment Opportunity

Commission shall -

(1) be responsible for the annual review and approval of a national and regional equal employment opportunity plan which each department and agency and each appropriate unit referred to in subsection (a0 of this section shall submit in order to maintain an affirmative program of equal employment opportunity for all such employees and applicants for employment;

(2) be responsible for the review and evaluation of the operation of all agency equal employment opportunity programs, periodically obtaining and publishing (on at least a semiannual basis) progress reports from each such department, agency, or unit; and

(3) consult with and solicit the recommendation of interested individuals, groups, and organizations relating to equal employment opportunity.

The head of each such department, agency, or unit shall comply with such rules, regulations, orders, and instructions which shall include a provision that an employee or applicant for employment shall be notified of any final action taken on any complaint of discrimination filed by him thereunder. The plan submitted by each department, agency, and unit shall include, but not be limited to -

(1) provision for the establishment of training and education programs designed to provide a maximum opportunity for employees to advance so as to perform at their highest potential; and

(2) a description of the qualifications in terms of training and experience relating to equal employment oppor-

tunity for the principal and operating officials of each such department, agency, or unit responsible for carrying out the equal employment opportunity program and of the allocation of personnel and resources proposed by such department, agency, or unit to carry out its equal employment opportunity program.

With respect to employment in the Library of Congress, authorities granted in this subsection to the Equal Employment Opportunity Commission shall be exercised by the Librarian of Congress.

(c) Civil action by employee or applicant for employment for redress of grievances; time for bringing of action; head of department, agency, or unit as defendant

Within 90 days of receipt of notice of final action taken by a department, agency, or unit referred to in subsection (a) of this section, or by the Equal Employment Opportunity Commission upon an appeal from a decision or order of such department, agency, or unit on a complaint of discrimination based on race, color, religion, sex or national origin, brought pursuant to subsection (a) of this section, Executive Order 11478 or any succeeding Executive orders, or after one hundred and eighty days from the filing of the initial charge with the department, agency, or unit or with the Equal Employment Opportunity Commission on appeal from a decision or order of such department, agency, or unit until such time as final action may be taken by a department, agency, or unit, an employee or applicant for employment, if aggrieved by the final disposition of his complaint, may file a civil action as provided in section 2000e-5 of this title, in which civil action the head of the department, agency, or unit, as appropriate, shall be the defendant.

(d) Section 2000e-5(f) through (k) of this title applicable to civil actions

The provisions of section 2000e-5(f) through (k) of this title, as applicable, shall govern civil actions brought hereunder, and the same interest to compensate for delay in payment shall be available as in cases involving nonpublic parties. [fn1]

(e) Government agency or official not relieved of responsibility to assure nondiscrimination in employment or equal employment opportunity Nothing contained in this Act shall relieve any Government agency or official of its or his primary responsibility to assure nondiscrimination in employment as required by the Constitution and statutes or of its or his responsibility under Executive Order 11478 relating to equal opportunity in the Federal Government.

[fn1] So in original.

APPENDIX B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANNON A. DARDAR	CIVIL ACTION
VERSUS	NO. 02-3802
JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE	SECTION "K" (3)

Filed March 4, 2004

MEMORANDUM OPINION AND ORDER

Defendant, John E. Potter, United States Postmaster General, on behalf of the United States Postal Service has filed a Motion to Dismiss and Alternatively for Summary Judgment dismissing the plaintiffs claims, pursuant to Rules 12(b)(1), 12(b)(6) and 56 of the Federal Rules of Civil Procedure. Plaintiff, Shannon A. Dardar, filed formal a opposition memorandum to which the Government formally replied. This matter is before the undersigned Magistrate Judge pursuant to the parties' consent.[1] This Court conducted an oral hearing with respect to the aforesaid motion on March 3, 2004, following which defendant's motion was deemed submitted for decision. For the following reasons, the defendant's motion is GRANTED.

DATE OF ENTRY
MAR 0 5 2004

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[1]Consent to Proceed before a United States Magistrate Judge dated July 18, 2003.[Rec. Doc. No. 17].

I. STATEMENT OF THE ISSUES

Defendant contends that the plaintiffs claims should be summarily dismissed with prejudice for the following reasons, to wit:

- lack of standing to sue under Title VII, 42 V.S.C. § 2000e-16;

- lack of standing to sue under 42 U.S.C. § 1981;

- lacks of jurisdiction over the plaintiffs claims concerning any and all torts arising out conduct constituting assault, battery and/or interference with contract rights due to sovereign immunity pursuant to 28 U.S.C. § 2680(h); and

- lacks of subject matter jurisdiction over the plaintiffs contractual claims pursuant to the Tucker Act, 28 U.S.C. § 1346 et seq. and the Contracts Disputes Act, 41 U.S.C. § 602(a)(2), which preempts the general jurisdictional provision of the Postal Reorganization Act, 39 U.S.C. § 409(a)..

More specifically, defendant contends that: (1) plaintiffs allegation of gender discrimination is not legally cognizable under Title VII because the plaintiff was at all pertinent times an independent contractor and not an agency "employee"; (2) plaintiff lacks standing to sue under 42 U.S.C. § 1981 for the reasons that plaintiff has not alleged any claim related to race and that the federal government is immune from suit under § 1981; (3) plaintiffs claim of damages for intentional infliction of emotional distress arises out

of the principal conduct constituting the torts of assault, battery and tortious inference with contract, all of which conduct is specifically excepted from the Government's waiver of sovereign immunity pursuant to the Federal Tort Claims Act as set forth in 28 U.S.C. § 2680(h); and (4) the district court lacks subject matter jurisdiction over the plaintiffs breach of contract claim pursuant to 28 V .S.C. § 1346, which restricts the district court's concurrent jurisdiction to claims against the United States not exceeding $10,000.00 and the Contract Disputes Act, 41 U.S. C. 9 602(a)(2), which preempts the general grant of jurisdiction under 39 U.S.C. § 409(a). To the extent that the defendant has relied on matters outside of the record, the defendant has moved alternatively for summary judgment; accordingly, either or both standards may be applied as circumstances warrant.

Plaintiff concedes that she has failed to state a claim under 42 U.S.C. §1981[2] and, although she contends that her contract was breached and claims $50,000.00 in damages, plaintiff submits that she has made no contract claim in this suit. [3] With respect to her Title VII claims, plaintiff submits that she qualifies as an "employee," highlighting one irregularity report noting several violations of the provisions of her contract regarding "protection of mail" (i.e., "leaving items of mail unsecured in the open bed" and "totally unattended").[4] The same report also mentioned a major route

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[2] See Plaintiffs Memorandum in Opposition to Motion to Dismiss and/or for Summary Judgment at p. 7.

[3] *See id.* at p.16.

[4] *See id.* at pp. 8-9; Contract Route Irregularity Report dated 6/17/03 (Plaintiffs unmarked exhibit).

deviation and deviating from the 1/2 hour lunch break without authorization.[5] On that note, plaintiff premises her argument that the defendant controlled the details and the manner and means in which she performs her work and argues that the Court should conclude that she is an "employee" within the meaning of the law. Turning to her claim under the FTCA, plaintiff submits that her claim for emotional distress is premised on the fact that "Webb harassed her by making grabbing actions like he was going to grab her breasts...."[6] Notwithstanding the fact that she has alleged conduct constituting assault and battery[7] plaintiff submits that her tort claim is for intentional infliction of emotional distress and not for assault and battery.[8] In summary, the plaintiff contends that her claims pursuant to Title VII and the FTCA are not jurisdictionally deficient and that this Court should deny the Government's motion.

II. PROCEDURAL BACKGROUND AND UNDISPUTED FACTS

A. Plaintiffs Complaint

On December 24, 2002, plaintiff, Shannon Dardar

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[5] *See* Plaintiffs Memorandum in Opposition at pp. 8-9; Contract Route Irregularity Report dated 6/17/03 (Plaintiffs unmarked exhibit).

[6] *See* Plaintiffs Memorandum in Opposition at p. 15.

[7] *See id.* at pp. 4-5.

[8] *See id.* at p. 15.

("Dardar"), filed the captioned matter against John E. Potter, in his official capacity as Postmaster General of the United States Postal Service ("USPS"), alleging sexual harassment by Ronald Webb ("Webb"), an employee of the USPS who worked in the Mandeville Post Office, out of which office Dardar worked as a contract carrier.[9] Via first amended complaint, the plaintiff alleged violations of Title VII of the Civil Rights Act of 1964 as amended, 42 U.S.C. §2000e et seq., 42 V.S.C. § 1981 and the Federal Tort Claims Act, 28 V.S.C. §§1346, 2401 and 2671. Nominally, the plaintiffs claims include sexual harassment, disparate treatment, intentional infliction of mental or emotional distress and economic damages. The conduct alleged includes uninvited vile language, lewd and lascivious propositions and gestures, grabbing at plaintiffs breasts, cornering the plaintiff, actual offensive touching, and interference with her contract with the Postal Service, as well as threatened interference and making the performance of her rural route mail delivery contract more onerous and difficult.[10]

B. Rural Route Contract Mail Carrier

Plaintiff was initially employed as a casual clerk at the Mandeville, Louisiana Post Office from December 23, 1997 until May 24, 1998, when she resigned from her position with the United States Postal Service ("USPS"). The conduct referred to above did not commence until months thereafter, when plaintiff submitted a bid on a contract rural carrier route out of the same post office and was awarded a

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9 *See* Plaintiffs Original Complaint at §§ 1, 4, 12-13 [Rec. Doc. No.1].

10 *See* Plaintiffs Amended Complaint [Rec. Doc. No. 10].

$40,000.00 contract to deliver mail for the Postal Service.[11]

Beginning in August or September, 1998 and continuing through at least September 2001, plaintiff delivered mail for the USPS pursuant to the aforesaid contract to perform services as Highway Contract Rural Carrier.[12] The existence of this contract was widely known among the employees of the Mandeville Post Office, including other Highway Contract Rural Carriers and Mr. Ronnie Webb ("Webb"). [13] Webb was Supervisor of Customer Service and also acted as Officer in Charge ("IOC") of the Mandeville Post Office, pursuant to a temporary appointment for the period from September 1, 2001 until December, 2002.[14]

Dardar's contract required that she sort, case and deliver the mail. Pursuant to the contract, plaintiff was also responsible for providing her own transportation. Additionally, all expenses incurred in carrying out her duties under the contract, including the cost of the vehicle, as well as its maintenance and insurance, were the plaintiff's

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11 *See* Notice of Acceptance - Transportation Services Contract Proposal for Regular Service (hereinafter referred to as the "Contract") dated September 24, 1998 [USPS Exh. "C" *in globo*].

12 *See* Defendant's Request for Admission No.1 and Plaintiffs Response [Defendant's Exh. "A"].

13 *See id.*, at Item No.2.

14 *See* Plaintiffs Complaint at ¶13; Plaintiffs First Amended Complaint at' 16; Declaration of Ronald Webb (hereinafter "Webb Declaration") at ¶¶ 1-2,21 [Defendant's Exh. "B"].

responsibility under the contract.[15] There was no provision under the contract for any retirement, health, or employment benefits of any kind and the plaintiff received no such benefits.[16] No taxes including FICA or FUTA were withheld from the plaintiffs pay for mail delivery services. [17] Rather, Dardar's compensation was based on a predetermined formula stipulated in her contract, i. e., her compensation remained the same whether it took six or sixteen hours to deliver her route on a given day.[18] The extent to which management at the Mandeville Post Office regulated the manner in which Dardar performed her contract work consisted of (a) established times for reporting and going out/returning from delivering mail on the street, and (b) a standing order to case and deliver all of the mail for her route every day.[19] Unlike a regular carrier employee of the Postal Service, Dardar did not submit and could not submit a PS Form 1571 for auxiliary assistance to anyone in management at the Mandeville Post Office.[20] Plaintiff was responsible for procuring substitutes to perform the contractual services in

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15 *See* Request for Admissions Items 2-4; Plaintiffs Responses [Defendant's Exh. "A"]; Contract [Defendant's Exh. "C"].

16 *See id* at Item 5; Plaintiffs Response.

17 *See id* at Item 6; Plaintiffs Response.

18 *See id* at Items 7, 11; Plaintiffs Responses.

19 *See id* at Items 8, 9, 10; and Plaintiffs Responses thereto at Items 8, 9 and 10.

20 *See* Request for Admission at Item 10; Plaintiffs Response [Defendant's Exh. "A"]; *see also* Webb Declaration at ¶¶ 5-6 [Defendant's Exh. "B"].

the event that she was unable, for any reason, to perform mail delivery services with respect to her route.

Plaintiff alleges that, when her status changed to contract carrier, Webb began harassing her with unsolicited crude statements, gestures with sexual overtures, sexual propositions, offensive assault on her person by cornering her on one occasion, threatened offensive contact by attempting to grab at her breasts, which she avoided by backing away, and by actually grabbing her arm on one occasion. She further alleges that Webb interfered with her contract by refusing to forward a route xtension request to the Postal Service Contract Office. Dardar alleges that all of these intentional actions made the performance of her contract more difficult and caused her suffer severe mental and emotional distress regarding her position and remuneration owed under her contract. Plaintiff admits that she suffered economic loss of approximately $50,000 in lost mileage on her contract as a direct result of Webb's conduct,[21]

On September 30, 2001, Dardar wrote Postmaster Charlie Specialie of the Mandeville Post Office claiming that she had been sexually harassed by Webb from September of 1998 through August 30, 2001.[22] An administrative inquiry was requested on September 28, 2001 and was conducted during the month of October, 2001. The investigative report

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21 *See* Plaintiff's First Amended Complaint at ¶¶ 17-24; Requests for Admissions and Plaintiff's Responses at Items12, 14-23 [Defendant's Exh. "A"].

22 *See* Correspondence dated August 30, 2001 [Defendant's Exh. "E"].

issued on October 22, 2001. Dardar exhausted her administrative claims with the Postal Service under both the EEO and FTCA regimes, seeking damages for gender discrimination in employment and for torts including assault, battery, interference with contract, and intentional infliction of emotional distress.[23] On September 27, 2002, the EEO Final Agency Decision issued, denying her EEO complaint for failure to state a claim. The finding was based upon the determination that Dardar was not an agency employee and therefore lacked standing as an aggrieved person under Title VII.[24] Plaintiffs administrative claim under the FTCA was also denied by the Postal Service.[25] On June 20, 2003, plaintiff filed her first amended complaint so as to include her claims pursuant to the FTC A, since she had exhausted her administrative remedies with respect to those claims.[26]

III. APPLICABLE STANDARDS

A. Motion to Dismiss

When ruling on a motion to dismiss, the Court must accept all well-pleaded facts as true and view them in the light most favorable to the pleading party.[27] The complaint

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23 *See* Fact Finding Report and EEO Investigative Report [Defendant's Exhibit "3" *in globo*].

24 *See* Final Agency Decision dated September 27,2002 [Defendant's Exhibit "H"].

25 *See* Plaintiffs Affidavit of Claim under the FTCA [Defendant's Exh."I"]; Final Denial of Administrative Claim dated May 1,2003 [Defendant's Exh."J"].

26 [Rec. Doc. No. 14].

27 *Baker v. Putnal*, 75 F.3d 190, 196 (5th Cir. 1996).

should only be dismissed if it appears beyond doubt that the pleading party can prove no set of facts in support of the claims raised that would entitle her to relief.[28] The question is whether in the light most favorable to the plaintiff and with every doubt resolved in her behalf, the complaint states any valid claim for relief.[29]

Rule 12(b)(I) of the Federal Rules of Civil Procedure allows a party to move to dismiss an action for lack of subject matter jurisdiction. On a motion brought under Rule 12(b)(1), which the Court must consider before any other challenge,30 the court must dismiss a cause for lack of subject matter jurisdiction "when the court lacks the statutory or constitutional power to adjudicate the case."[31]

A Rule 12(b)(6) dismissal is proper where the plaintiff can prove no set of facts which entitle her to relief.[32] Although there are exceptions to the mandate, generally a court should consider only the pleadings when deciding a Rule 12(b)(6) motion to dismiss. When a court considers matters outside of the pleadings, Rule 12(b) requires that the motion be treated as if it were one for summary judgment and that the matter be disposed of as provided in Rule 56.

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[28] *See Cinel v. Connick*, 15 F.3d 1338, 1341 (5th Cir.), *cert. denied*, 513 U.S. 868 (1994).

[29] *See Beanal v. Freeport-McMoran, Inc.*, 197 F.3d 161, 164 (5th Cir. 1999).

[30] *See Moran v. Kingdom of Saudi Arabia*, 27 F.3d 169,172 (5th Cir. 1994).

[31] *Home Builders Association of Miss. v. City of Madison, Miss.*, 143 F.3d 1006, 1010(5th Cir. 1998) (internal quotation marks omitted).

[32] *See Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001), *cert. denied sub nom, Cloud v. United States*, 536 U.S. 960 (2002).

B. Summary Judgment

The principal purpose of Fed. R. Civ. P. 56 is to "isolate and dispose" of factually unsupported claims.[33] Summary judgment is proper where "the pleadings, depositions, answers to interrogatories and admissions on file, together with affidavits, if any, show that there is no genuine issue of material fact...."[34] There is no "genuine issue" when the record taken as a whole could not lead a rational trier of fact to find for the nonmovant.[35]

Summary judgment will be granted against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial."[36] A complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial.[37] "In such a situation, there can be 'no genuine issue of material fact' since a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial."[38]

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33 *Celotex Corp. v. Catrett*, 477 U.S. 317,323 (1986).

34 Ped. R. Civ. P. 56(c).

35 *Matsushita Elec. Indus. Co., Ltd v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986).

36 *Celotex*, 477 U.S. at 323.

37 *Nebraska v. Wyoming*, 507 U.S. 584,590 (1993); *Celotex*, 477 U.S. at 323; *Wenner v. Texas Lottery Commission*, 123 F.3d 321, 324 (5th Cir.), *cert. denied*, 523 U.S. 1073 (1998).

38 *Celotex*, 477 U.S. at 322-23.

The Court has no duty to search the record for triable issues.[39] Mere assertions of a factual dispute unsupported by probative evidence will not prevent summary judgment.[40] "The party opposing summary judgment is required to identify specific evidence in the record and to articulate the precise manner in which the evidence supports his or her claim."[41] Conclusory statements, speculation and unsubstantiated assertions are not competent summary judgment evidence and will not suffice to defeat a properly supported motion for summary judgment.[42] "Summary judgment is appropriate in any case 'where critical evidence is so weak or tenuous on an essential fact that it could not support a judgment in favor of the nonmovant.' "[43]

IV. ANALYSIS

A. Title VII Standing/Jurisdiction

Title 42 U .S. C. § 2000e-16, entitled "Employment by the Federal Government," provides that "all personnel actions affecting employees or applicants for employment ... in the United States Postal Service ... shall be made free from any discrimination based on race, color, religion, sex, or

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39 *Ragas v. Tennessee Gas Pipeline Co.*, 136 F.3d 455,458 (5th Cir. 1998).

40 *Celotex*, 477 U.S. at 248-50; *Abbot v. Equity Group, Inc.*, 2 F.3d 613,619 (5th Cir. 1993).

41 *Ragas*, 136 F.3d at 458 (emphasis added).

42 *Id.; Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1429 (5th Cir. 1996).

43 *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075-76 (5th Cir. 1994)(citing *Armstrong v. City of Dallas*, 997 F.2d 62 (5th Cir. 1993)).

national origin."[44] By its terms, § 2000(e)-16(a) allows only "employees" or "applicants for employment" to file suit against a federal agency under Title VII.

Absent an employer-employee relationship between the plaintiff and the defendant, the aggrieved plaintiff does not have standing to bring a Title VII claim of discriminatory treatment as an employee.[45] The question of the plaintiffs status as an "employee" under Title VII as opposed to an independent contractor is a question of federal law.[46] Because Title VII defines an "employee" as "an individual employed by an employer," the Fifth Circuit has adopted the "hybrid economic realities/common law control test" to determine whether an aggrieved plaintiff's an employee

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44 42 U.S.C. § 2000e-16(a).

45 *See Diggs v. Harris Hospital-Methodist Inc.*, 847 F.2d 270, 272 (5th Cir.), *cert. denied*, 488 U.S. 956 (1988); *Broussard v. L.H. Bossier Inc.*, 789 F .2d 1158, 1159 (5th Cir. 1986); *Heckler v. Product Development Corp.*, 2003 W.L. 22961214 at * 2 (N. D. Tex.); *Johnson v. Crown Enterprises, Inc.*, 294 F.Supp.2d 850, 854 (M. D. La. 2003) (Polozola, J.); *Elie v. Hilton*, 131 F.Supp.2d 835, 837 (W. D. La. 2001) (Little, J.);*Arbough v. Y & H Corporation*, 2003 WL 1797893 ** 5-6 (E. D. La.) (Shushan, M. J.).

46 *Oden v. Oktibbeha County, Mississippi*, 246 F.3d 458, 465 (5th Cir.), *cert. denied*, 534 U.S. 948 (2001); *Caulderon v. Martin County*, 639 F.2d 271,272-73 (5th Cir. 1981).

within the meaning of Title VII.[47]

Although the Fifth Circuit has consistently held that the most important factor in the inquiry is whether the alleged employer controls the manner and means of the worker's performance (i.e., the right to control), that factor, standing alone, is not determinative.[48] The factors pertinent to the inquiry as to the "right to control" include ownership of equipment used to perform the job, responsibility of costs of maintaining that equipment (such as licensing and taxes), length of employment period, payment methods, and directives on schedules and how the work is to be performed.[49]

However, the right to control alone is not determinative. The economic realities component of the test examines other relevant factors, to wit: (1) the kind of occupation, with reference to whether the work is generally done under the direction of a supervisor or without supervision; (2) the skill required in the particular occupation; (3) whether the "employer" or the individual in question furnishes the equipment used and the place of work; (4) the length of time

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47 *See Diggs.* 874 F.2d at 272; *Broussard,* 789 F.2d at 1159; *Mares v. Marsh.* 777 F.2d 1066, 1067-68 (5th Cir.1986) (adopting the eleven-factor test first set forth in *Spirides v. Reinhardt,* 613F.2d 826 (D. C. Cir. 1979)); *Taylor v. Eastside Auto, Truck and Tire Repair,* 2001 WL 214032, * 2 n. 26 (E. D. La.) (Africk, M. J.); *Cole v. Venture Transport. Inc.,* 2000 WL 335743, * 3 (E. D. La.) (Vance, J.).

48 *See Broussard.* 789 F.2d at 1160; *Mares,* 777 F.2d at 1067. E.g.. *Bloom v. Bexar County, Texas,* 130 F.3d 722, 726 (5th Cir. 1997).

49 *Broussard,* 789 F.2d at 1160; *Mares,* 777 F.2d at 832-33.

during which he individual has worked; (5) the method of payment, whether hourly or by the job; (6) the manner in which the work relationship is terminated, i.e., by one or both parties, with or without notice and explanation; (7) whether annual leave is afforded; (8) whether the work is an integral part of the business of the "employer"; (9) whether the worker accumulates benefits; (10) whether the "employer" pays social security taxes; and (11) the intention of the parties.[50] Suffice it to say, "the test requires a court to carefully consider the particular facts of each case, rather than using any general formulas, in order to determine the nature of the labor relationship at issue."[51]

Having considered the undisputed facts of this case, this Court concludes that there is no genuine dispute of material fact that Dardar was an independent contractor at all pertinent times. More particularly, plaintiff delivered mail under a contract administered out of Dallas, Texas. Her position was characterized as Highway Contract Rural Carrier and was for a set duration as prescribed in the contract. Remuneration pursuant to the contract was predicated on the most efficient route, as well as a predetermined formula based upon mileage and the amount of mail delivered; thus the contract carrier (Dardar) was paid the same regardless of the time it took to provide mail service on her rural route. An administrative official in the regional post office assessed whether or not the contract is carried out.

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50 *Mares*, 777 F.2d at 832-33 (*quoting Spirides v. Reinhardt*, 613 F.2d 826, 832 (D. C. Cir. 1979)). *See e.g., Bloom*, 130 F .3d at 726 n. 3; *Deal v. State Farm Mutual Ins. Co.*, 5 F.3d 117, 119 (5th Cir. 1993).

51 *Steehler v. Product Development Corp.*, 2003 WL21528523 (N. D. Tex.)(Buchmeyer, J.).

Dardar did not earn leave and, if assistance was needed, as in the case of all rural route contracted carriers, the plaintiff was required to make her own arrangements for a replacement. She was responsible for providing her own transportation to fulfill her obligations under the contract, including providing maintenance and insurance on her own delivery vehicle. Dardar accrued no retirement, health or employment benefits of any kind. No taxes or amount of any nature was withheld from the plaintiffs contractual remuneration. Moreover, there was no apparent intent to form an employer-employee relationship. The "Contract Route Irregularity Report" memorializing Dardar's violation of her stipulated contractual duties - i.e., "Violation to Contract B-7 #C Protection of mail" - compel no other conclusion. Plaintiffs contract requires that she protect the mail at all times while out on delivery. [52] Moreover, the contract stipulates the times by which she is required to start and progress upon her route, the route itself, and the Postal Service's right to cancel the contract for material breach of any requirement or clause of the contract (i.e., for non-compliance).[53] General oversight to ensure compliance with contract specifications is not synonymous with supervision and control over the manner and means of Dardar's performance.

Considering all of the relevant factors adopted by the Fifth Circuit in Mares, supra - most of which were not addressed by the plaintiff - the balance is weighs decidedly in favor of the conclusion that the plaintiff does not qualify

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52 *See* Contract at Section B.3 entitled "Sanctity of the Mail" [Defendant's Exhibit "C"].

53 *See id* at Section B.1 entitled "Schedule, Frequency and Service Requirements"and Section H.5 entitled "Events of Default"

as an "employee" within the meaning of the applicable law. The question before this Court is not whether every speck of evidence supports the conclusion that the plaintiff was an independent contractor. Rather, it is sufficient that this Court find that there is no material issue of fact as to the plaintiffs status as an independent contractor. Having so found, the plaintiff is without standing to bring a Title VII employment discrimination claim.

B. § 1981 Standing/Jurisdiction

42 U.S.C. § 1981 states that "[a]ll persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property *as is enjoyed by white citizens....*"[54] In 1991, Congress amended this statute to include the additional provision that "[t]he rights protected by this section are protected against impairment by nongovernmental discrimination and impairment *under color of State law.* [55]

Section 1981 derives from the Civil Rights Act of 1966 and was intended to eradicate all discrimination against blacks and to secure their full freedom and equality in civil rights; therefore racial animus is a necessary element of a claim under this section. Plaintiff does not allege discrimination based upon race.

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[54] 42 U.S.C. § 1981(a).

[55] 42 U.S.C. § 1981(c).

The Fifth Circuit has long recognized that suits against the United States under the civil rights statutes are barred by the doctrine of sovereign immunity except where explicitly waived.[56] Simply stated, the plain text of § 1981 compels the conclusion that it is inapplicable to discrimination which is based upon allegations wholly unrelated to race. Additionally the federal government is not subject to suit under § 1981. As such, the Court is without jurisdiction and, in any event, the plaintiff concedes that she has failed to state a claim under 42 U.S.C. § 1981.

C. Federal Tort Claims Act (FTCA)
Standing/Jurisdiction

The defendant argues that the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 1346, 2671 *et seq.*, is the exclusive vehicle for bringing state law tort claims against governmental agencies and therefore this Court lacks jurisdiction over the state tort law claims alleged against the Postmaster General, given that Dardar has not named the United States as a defendant and because the waiver of sovereign immunity does not apply to the offensive conduct at issue.

The Federal Tort Claims Act provides a remedy for claimants against the *United States* for damage to or loss of property, as well as personal injury or death caused by the negligence of a government employee acting within the course and scope of his or her employment.[57]

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[56] *See Affiliated Professional Home Health Care Agency v. Shalala,* 164 F.3d 282,286 (5th Cir. 1999); *Marsaw v. Trailblazer Health Enterprises, LLC.* 192 F.Supp.2d 737, 744 n. 7, 750 (S. D. Tex. 2002) (Kent, J.).

[57] 28 U.S.c. § 2671.

The FTC A specifically states that a plaintiffs exclusive course of action under the FTCA is against the *United States* and grants federal employees absolute immunity from common law tort actions by providing for the substitution of the United States as the sole defendant in such actions.[58] Absent a waiver, sovereign immunity shields the federal government, its agencies and employees from suit. [59] Because sovereign immunity is jurisdictional in nature, neither the Postal Service, nor the Postmaster General are appropriate defendants under the limited waiver set forth in the FICA; therefore the plaintiff lacks standing and the case must be dismissed for lack of subject matter jurisdiction.

Even if Dardar could cure the foregoing defect by amending her Complaint to name the United States as the proper party defendant, her assault and battery claims against the government would remain infirm for the second reason set forth by the defendant. In particular, the waiver of immunity contained in the FTCA does not apply to conduct which, in essence, constitutes the claims of assault, battery or interference with contract rights.[60]

Pursuant to Circuit precedent, the plaintiff cannot evade the reach of exceptions set forth in § 2680(h) by nominally characterizing her claim as one for tort of intentional infliction of emotional distress (lIED) or negligent supervision of the offending employee, because the FTCA bars a

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[58] 28 U.S.C. § 2679(a).

[59] *FDIC v. Meyer*, 510 U.S. 471, 475 (1994).

[60] *See* 28 U.S.C. § 2680(h); *see also United States v. Shearer*, 473 U.S. 52, 54 (1985); *Truman v. United States*, 26 F.3d 592, 594 (5th Cir. 1994).

claim based on the conduct that constitutes a tort listed in section 2680(h), *even though that conduct may also constitute another tort.*[61] The Fifth Circuit cogently summarized and explained the applicable law as follows:

> To determine whether a claim is one "arising out of' any of these enumerated torts [which are excepted by § 2680(h) from the FTCA's reach], we focus on the conduct upon which the plaintiffs claim is based. If the conduct upon which a claim is based constitutes a claim "arising out of' anyone of the torts listed in section 2680(h), then the federal courts have no jurisdiction to hear that claim. *United States v. Neustadt*, 366 U.S. 696 (1961); *Commercial Union Ins. Co. v. United States,* 928 F .2d 176, 178-79 (5th Cir. 1991). Even if a plaintiff styles a claim so that it is not one that is enumerated in section 2680(h), the plaintiffs claim is still barred "when the underlying governmental conduct 'essential' to the plaintiffs claim can fairly be read to 'arise out of conduct that would establish an excepted cause of action." *McNeily*, 6 F.3d at 347 (*citing Atorie*, 942 F.2d at 958). Thus, the FTCA bars a claim based on conduct that constitutes a tort listed in section 2680(h), even though that conduct may also constitute another tort not listed in section 2680(h). Similarly, a plaintiff cannot circumvent the purpose of section 2680(h) by "framing his complaint in terms of [the government's] negligent failure to prevent the excepted harm." Id. at 347. Thus we held in *Garcia v. United*

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61 *See Truman,* 26 F.3rd 592, 594-95 (5th Cir. 1994) (*citing Garcia v. United States*, 776 F.2d 116 (5th Cir. 1985)).

> *States*, 776 F.2d 116 (5th Cir. 1985), that a plaintiff could not evade the reach of section 2680(h) by raising a claim for negligence in the supervision of a military recruiter who allegedly assaulted the plaintiff. For the purposes of section 2680(h), Garcia's negligence claim arose out of an assault and battery. *Id.* at 118.[62]

For reasons set forth above, this Court does not have jurisdiction over the plaintiffs tort claims, inasmuch as the alleged conduct essential to and comprising plaintiffs claim of intentional infliction of emotional/mental distress ("IIED"), when fairly read, constitute the torts of assault, battery and/or tortious interference with contract - - all of which are excepted by § 2680(h) - - as more fully explained herein.

The instant is distinguishable from *Truman, supra.* In that case, a claim of intentional infliction of emotional distress was filed against an Air Force Base employee and the United States under the FTCA. In *Truman*, the plaintiff alleged that the defendant made numerous sexual insults, comments and innuendos that damaged her and caused her to suffer mental anguish, anxiety, embarrassment and humiliation, IIED.[63] Finding that some offensive contact is an essential element of the tort of battery and that the plaintiff alleged no offensive contact either directly or indirectly resulting from the defendant's actions, the Court held that a battery did not occur. Thus the plaintiff's IIED claim could not be fairly characterized as arising out of a conduct which constitutes a

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62 *Truman*, 26 F.3d at 594-95.

63 *Id.* at 595.

battery .[64] As to the tort of assault, the court noted that words alone cannot make a person liable for assault, unless those words, together with other circumstances, place the plaintiff "in reasonable apprehension of imminent harmful and offensive contact."[65] Because the plaintiff in Truman did not allege that the defendant's acts placed her in imminent apprehension of harmful or offensive contact, or did the plaintiff claim that any of the defendant's offensive comments, together with other circumstances, placed her in reasonable apprehension of imminent offensive contact, the Truman court found that the plaintiffs claim did not arise out of conduct constituting an assault.

Unlike *Truman,* plaintiff alleged that Webb cornered her in her workspace, grabbed her by the arm and made offensive comments accompanied by grabbing gestures (as if he were going to touch her breast). Plaintiff has further alleged that often she had to either apprehend Webb's offensive gestures or back away to prevent offensive touching. Suffice it to say, plaintiff's allegations demonstrate that Webb's conduct, including words accompanied by threatened and actual offensive contact, placed her in imminent apprehension of harmful contact (assault) and/or *actual* offensive contact (battery). Such conduct constitutes assault and/or battery and not *mere words*. There can be no liability against the United States for IIED for actions "arising out of' conduct excepted under the FTCA.[66]

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64 *Truman*, 26 F.3d at 595.

65 *Id.*

66 *See Stidham v. United States*. 2000 WL 1171122 (E. D. La.) (Porteous, J.) (distinguishing *Truman, supra*), *affirmed*, 252 F.3d 434 (5th Cir. 2001).

The Court now addresses the plaintiffs claim oftortious interference with her Postal Service contract. Plaintiffs claims of emotional distress because of Webb's alleged refusal to forward her requests for route extensions to the contract administrators, all of which caused her to suffer unnecessary hardship/monetary loss, made the performance of her contractual obligations more difficult and/or caused the breach of her contractual duties. The alleged conduct supports a claim for tortious interference with contract under Louisiana law, an excepted tort under § 2680(h). Therefore, such conduct cannot simultaneously constitute a viable claim for lIED against the government. Moreover, absent the outrageous conduct complained of, which support claims for assault, battery and tortious interference with contract, the plaintiffs lIED claim fails to rise to the level of extreme and outrageous conduct required under Louisiana law.[67]

In summary, Dardar's claims against the USPS are controlled by the FTCA. Under the FTCA, the plaintiff must sue the United States rather than a federal employee or agency. Moreover, her claim for lIED arises out of conduct which comprise tort claims specifically excepted by the FTCA. Therefore, the plaintiff lacks standing and, alternatively, this Court lacks subject matter jurisdiction.

D. Contractual Claim Standing/Jurisdiction

Plaintiff alleges that she has incurred damages amounting to $50,000.00 due to Webb's failure to correct the mileage on her contract. USPS has also moved to dismiss

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[67] *See White v. Monsanto Co.*, 585 So.2d 1205, 1209 (La. 1991).

this claim for lack of jurisdiction. Although in her opposition memorandum, plaintiff contends that she has stated no claim sounding in contract, a fair reading of the complaint admits the opposite conclusion. For purposes of completeness, the Court addresses the plaintiffs claim for contractual damages and the potential jurisdictional bases for such claim serially below.

Dardar asserts that jurisdiction over this action exists under 28 U.S.C. §§ 1331 and 1339. Section 1331 simply provides that the "district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties ofthe United States;" section 1339 provides that the" district courts shall have jurisdiction of any civil action arising under any Act of Congress relating to the postal service." 28 U.S.C. §§ 1331, 1339. Neither one of these statutes provide an independent basis of subject matter jurisdiction. Rather, § 1339 permits the postal service to sue and e sued provided that "a separate statute relating to the postal service affords a cause of action."[68] Additionally, plaintiff does not state a claim that "aris[es] under" any Act of Congress. More particularly, this Court has previously addressed the plaintiffs Title VII, Section 1981 and FTCA claims finding lack of standing and/or subject matter jurisdiction. Plaintiffs state law tort and contract claims do not suffice for purposes of providing subject matter jurisdiction sufficient to support a claim as to either § 1331 or § 1339.

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68 *Snapp v. United States Postal Service*, 664 F.2d 1329, 1332 (5th Cir. 1982); *see also Roman v. United States Postal Service*, 821 F.2d 382, 385 (7th Cir. 1987); *O'Connor v. Yezukevicz*, 589 F.2d 6, 18 (1st Cir. 1978).

The Postal Reorganization Act ("PRA"), 39 U.S.C. §§ 401(1) and 409, has been held to constitute merely a general waiver of sovereign immunity and not a general grant of subject matter jurisdiction.[69] In *Hexamer*, the Fifth Circuit noted "a split in the circuits" concerning the reach of this statute,[70] but nevertheless concluded that the PRA did not confer subject matter jurisdiction in the case before it, involving USPS as a stakeholder in a garnishment proceeding.

Even assuming that the PRA generally confers subject matter jurisdiction in certain cases where the Postal Service is a party, the law of this Circuit is that the Contract Disputes Act ("CDA"), 41 U .S.C. § 601 *et seq.*, vests *exclusive* jurisdiction over *certain procurement contracts* in the Agency Board of Contract Appeals or the United States Court of Federal Claims and preempts application of the PRA.[71]

The Contract Disputes Act of 1978,41 U.S.C. §§ 601-613, applies to executive agency public contracts such as the

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69 *See Hexamer v. Foreness*, 981 F.2d 821, 823-24 (5th Cir. 1993).

70 *See Kroll v. United States.* 58 F.3d 1087, 1092 (6th Cir. 1995); *People's Gas, Light & Coke Co. v. United States Postal Service.* 658 F .2d 1182 (7th Cir. 1981); *Roman v. United States Postal Service*, 821 F.2d 382, 385 (7th Cir. 1987); *O'Connor v. Yezukevicz*, 589 F.2d at 18; *Westwood Promotions v. United States Postal Service*, 718 F.Supp. 690, 693 (N. D. Ill. 1989); *Combined Communications Corp. v. United States Postal Service*, 686 F.Supp. 663, 667-78 (M. D. Tenn.), *affirmed*, 891 F.2d 1221 (6th Cir. 1989). *But see Licata v. USPS*, 33 F.3d 259 (3d Cir. 1994); *Continental Cablevision v. USPS*, 945 F.2d 1434, 1437 (8th Cir. 1991).

71 *See Jackson v. Postal Service*, 799 F.2d 1018, 1022 (51h Cir.), *reh 'g denied*, 853 F.2d 717 (5th Cir. 1986).

transportation services contract in question.[72] Section 602 ofthe CDA provides that:

> (a) Executive agency contracts Unless otherwise specifically provided herein, this chapter applies to any express or implied contract (including those of the nonappropriated fund activities described in sections 1346 and 1491 of Title 28) entered by an executive agency for -
> (1) the procurement of property, other than real property in being;
> (2) *the procurement of services;*
> (3) the procurement of construction, alteration, repair or maintenance of real property; or
> (4) the disposal of personal property.[73]

The CDA expressly states that USPS is an executive agency covered under its terms.[74] Where it applies, the CDA is the exclusive remedy for a dispute against federal government agencies. The CDA plainly states that "[a]ll claims by a contractor against the government shall be in writing and shall be submitted to the contracting officer for a decision."[75] A contractor may appeal an adverse determination to an agency board or it may bring an action directly in the United States Court of Claims.[76]

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72 *See* 41 U.S.C. § 602.

73 *Id.* (italized, bolding and underlining emphasis added).

74 *Id.* at § 601(2).

75 *Id.* at § 605(a)

76 *Id.* at §§ 605(c), 607, 609(1).

The rationale set forth by the Fifth Circuit in *Jackson v. Postal Service,* 799 F.2d 1018 (5th Cir. 1986) regarding a USPS procurement contract controls the disposition of the instant dispute, which involves a USPS contract for the *procurement of services* (*i.e.*, rural route mail delivery). The *Jackson* court observed:

> Prior to the enactment of the Contract Disputes Act of 1978; 41 U.S.C. §§ 601-613, the district courts enjoyed concurrent jurisdiction over suits against USPS *in eo nomine* for breach of a USPS contract, regardless of the amount involved. 28 U.S.C. 1339 & 39 U.S.C. § 409(a); *see White v. Bloomberg*, 501 F.2d 1379 (4th Cir. 1974, *aff'g* 360 F.Supp. 58 (D. Md. 1973); *Butz Engineering Corp. v. United States*, 499 F.2d 619, 204 Ct.CI. 561 (1974); *Grasso v. United States Postal Service,* 438 F.Supp. 1231 (D. Conn. 1977); *Kennedy v. United States Postal Service*, 367 F.Supp 828 (D. Colo. 1973), *aff'd*, 508 F.2d 954 (10th Cir. 1974); *Gilmore v. United States,* 6 Ct.CI. 323 (1984), aff'd without opinion, 765 F.2d 163 (Fed. Cir. 1985).
>
> *With the enactment of the Contract Disputes Act,* ***the Claims Court*** *received exclusive jurisdiction to hearing any claim arising from* ***breach of a USPS procurement contract*** *covered* ***by the Act***. Thus to determine whether the district court could entertain plaintiffs claim for back rent, we must determine whether the subject lease was covered by the Contract Disputes Act. **If the Act applies, only the Claims Court may hear this case, 28 V.S.C. §§ 1346(a)(2) and 1491(a)(2); if it does not apply, the district court has jurisdiction.**

> The Contract Disputes Act applies to any express or implied contract entered into by the USPS, 41 U.S.C. § 601(2), for procurement of property other than real property in being.... The Contract Disputes Act applies to contracts entered into 120 days after November I, 1978. As to contracts entered into before the effective date of the Act, "the contractor may elect to proceed under [the] Act with respect to any claim ... initiated thereafter." P.L. 95-563, § 16,92 Stat. 2391.[77]

A fair reading of the *Jackson* decision leads inexorably to the conclusion that jurisdiction over contractual claims governed by the CDA does not lie in the district Court.[78] There is overwhelming support in other circuits for the conclusion that the jurisdictional provision of the CDA, 49 U.S.C. § 609(a)(1), supplants the pre-existing provision of the PRA, 39 U.S.C. § 409(a), that otherwise placed jurisdiction in the United States District Courts.[79]

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[77] *Jackson v. Postal Service*, 799 F.2d 1018, 1022 (5th Cir. 1986) (all emphasis added).

[78] *See Jackson v. Postal Service*, 799 F.2d 1018, 1022 (5th Cir. 1986); *accord Campanella v. Commerce Exchange Bank*, 137 F.3d 885, 890-91 (6th Cir. 1998).

[79] *See Campanella v. Commerce Exchange Bank*, 137 F.3d at 890-91; *A & S Council Oil Co. v. Lader*, 56 F.3d 234,242 (D. C. Cir. 1995); *United States of America v. J & E Salvage Co.*, 55 F.3d 985,987 (4th Cir. 1995); *B & B Industries, Inc. v. United States Postal Service*, 185 F .Supp.2d 760, 764-65 (E. D. Mich. 2002); *Tradesmen Intern., Inc. v. US. Postal Service*, 234 F.Supp.2d 1191, 1197-98 (D. Kan. 2002); *1-10 Industry Associates, Inc. v. United Postal Service*, 133 F.Supp.2d 194,| 195 n.l, 196-97 (E. D. N. Y. 2001); *Four Star Aviation, Inc. v. United States Postal Service*, 120 F.Supp.2d 523, 527-28 (D. V.I. 2000); *Spodek v. United States*. 26 F.Supp.2d 750, 754 (E. D. Pa. 1998); *Consumers Solar*

In *A & S Council Oil Co. v. Lader*, 56 F.3d 234 (D. C. Cir. 1995), the Federal Circuit noted that the CDA is lithe paradigm of a 'precisely drawn, detailed statute' that preempts more general jurisdictional provisions."[80] Because plaintiffs' claims could only be characterized as ones "relating to" executive agency contracts covered by the CDA and that they failed to exhaust the jurisdictional remedies required for relief under the Act, the *A & S* court concluded that the only appropriate action was to dismiss the case.[81]

In *B & B Industries, Inc. v. United States Postal Service*, 185 F.Supp.2d 760 (E. D. Mich. 2002), the court considered the issue of whether the CDA preempted claims against the Postal Service brought by mail transporters, who independently contracted with the United States Postal Service to transport mail by truck. The court held that while Congress waived sovereignty and allowed the USPS to sue and be sued in the PRA, the CDA trumps the PRA where the claim is "essentially contractual."[82] The court explained that even the mail transporters' claim for violation of various

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(footnote 79 continued)
Electric Power Corp. v. United States Postal Service, 530 F.Supp. 702, 705-07 (C. D. Ca.. 1982). *But see Wright v. United States Postal Service,* 29 F.3d 1426. 1428 (9thCir. 1994) (holding CDA does not eliminate subject matter jurisdiction for subcontractors' actions to establish equitable liens against USPS); *Marine Coatings of Alabama, Inc. v. United States,* 932 F .2d 1370, 13 77 (11 th Cir. 1991) (CDA does not supersede Admiralty Provisions).

80 *A & S Council Oil Co. v. Lader*, 56 F.3d at 242 (D. C. Cir. 1995) (*quoting Brown v. GSA,* 425 U.S. 820, 834 (1976)).

81 Id.

82 *B & B Industries, Inc.*, 185 F.Supp.2d at 764-65.

postal regulations did not avoid the jurisdictional bar of the CDA, because the dispute could have been resolved under the contract and contract principles uniquely within the expertise of the Federal Court of Claims. When examining competing jurisdictional bases, the issue is "to determine if the claim so clearly presents a disguised contract action that jurisdiction over the issue is properly limited to the Court of Claims."[83]

The plaintiff cannot avoid the jurisdictional bar of the CDA by alleging causes of action when this dispute obviously arises out of the contract. Dardar has in fact sought contractual damages in this case. "Effective enforcement of the jurisdictional limits of the CDA mandates that [this Court] recognize contract actions that are dressed in tort clothing."[84]

There is no doubt that Contract Disputes Act applies to the plaintiffs claims related to the performance of her rural route carrier contract and damages for breach. Thus, this Court does not have jurisdiction to hear the plaintiffs claims relating to the performance of her contract, modification of the contracted route or contractual remuneration/damages.

Regarding concurrent jurisdiction, the Little Tucker Act, 28 U.S.C. § 1346(a)(2), does not apply to this case because the plaintiff seeks more than $10,000.00. In this regard, the law of the Fifth Circuit is clear that the Federal

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83 *United States v. J & E Salvage Co.*, 55 F.3d 985, 988 (4th Cir. 1995) (*quoting Megapulse, Inc. v. Lewis*,672 F.2d 959, 968 (D. C. Cir. 1982».

84 *J & E Salvage Co.*, 55 F.3d at 987.

Court of Claims has exclusive jurisdiction over a Tucker Act claim in excess of $1 0,000.00, and that, when a plaintiff seeks damages in excess of that amount against the United States, the district court has no jurisdiction to entertain the plaintiffs claims.[85]

CONCLUSION

For the foregoing reasons, the defendant is entitled to the dismissal of the plaintiffs case in its entirety.

Accordingly,

IT IS ORDERED that the defendant's Motion to Dismiss and/or Alternatively for Summary Judgment is GRANTED.

New Orleans, Louisiana, this 4 day of March, 2004.

/s/ Daniel E. Knowles, III
DANIEL E. KNOWLES, III
UNITED STATES MAGISTRATE JUDGE

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85 *See Humphries v. Various Federal USINS Employees*, 164 F.3d 936, 941 (5th Cir. 1999).

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

SHANNON A. DARDAR	CIVIL ACTION
VERSUS	NO. 02-3802
JOHN E. POTTER, POSTMASTER GENERAL, UNITED STATES POSTAL SERVICE	SECTION "K" (3)

Filed Mar 4, 2004

JUDGMENT

Considering the Memorandum Opinion and Order dated March 4, 2004 granting the defendant's Motion to Dismiss the plaintiff's claims in the captioned matter with prejudice, accordingly;

IT IS ORDERED, ADJUDGED, AND DECREED, that there be judgment in favor of the defendant, John E. Potter, Postmaster General of the United States Postal Service, and against the plaintiff, Shannon A. Dardar, DISMISSING all ofthe plaintiffs claims WITH PREJUDICE, each of the parties to bear their own costs.

New Orleans, Louisiana, this 4 day of March, 2004.

/s/ Daniel E. Knowles, III
DANIEL E. KNOWLES, III
UNITED STATES MAGISTRATE JUDGE

Date of Entry Mar. 05 2004

APPENDIX D

U.S. DISTRICT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 04-30341
Summary Calendar

D.C. Docket No. 02-CV-3802-K
Filed Sep. 13, 2004

SHANNON A DARDAR
Plaintiff - Appellant

v.

JOHN E POTTER, Postmaster General, United States Postal Service; UNITED STATES OF AMERICA
Defendants - Appellees

Appeal from the United States District Court for the Eastern District of Louisiana, New Orleans.

Before EMILIO M. GARZA, DeMOSS, and CLEMENT, Circuit Judges.

JUDGMENT

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed.

IT IS FURTHER ORDERED that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Issued as Mandate NOV 05 2004

APPENDIX E

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 04-30341
(Summary Calendar)
CV-02-3802-K

Filed Sep. 13, 2004

SHANNON A DARDAR
Plaintiff - Appellant,

versus

JOHN E POTTER, Postmaster General, United States Postal Service; UNITED STATES OF AMERICA
Defendants - Appellees.

Appeal from the United States District Court
for the Eastern District of Louisiana
USDC No. 02-CV-3802-K

Before EMILIO M. GARZA, DeMOSS, and CLEMENT, Circuit Judges.

PER CURIAM:*

* Pursuant to 5TH CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5TH CIR. R. 47.5.4.

Appellant Sophia A. Dardar ("Dardar") appeals the district court's order granting defendants' motion to dismiss and alternatively for summary judgment. We find that the appellant does not have standing to sue under Title VII, 42 U .S.C. 2000(e), because she has failed to establish a genuine issue of material fact disputing her status as an independent contractor of the United States Postal Service. *Mares v. Marsh,* 777 F.2d 1066, 1067-69 (5th Cir. 1985). Similarly, we find her claims for intentional infliction of emotional distress are barred by the sovereign immunity afforded to the United States of America under the Federal Tort Claims Act. 28 U.S.C. § 2680. Finally, we agree with the district court's assessment that only the Federal Court of Claims has exclusive jurisdiction over appellants breach of contract claim. 28 U.S.C. § 1346.

Accordingly, we AFFIRM the district court's judgment.

APPENDIX F

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United States Court of Appeals
FIFTH CIRCUIT
OFFICE OF THE CLERK
Charles R. Fulbruge III
CLERK

November 5, 2004

Ms Loretta Whyte, Clerk
Eastern District of Louisiana, New Orleans
United States District Court
Room C-151
500 Poydras Street
New Orleans, LA 70130

No. 04-30341 Dardar v. Potter
USDC No. 02-CV-3802-K

Enclosed, for the district court only, is a certified copy of the judgment issued as the mandate.

Enclosed, for the district court only, is a copy of the court's opinion.

Record/original papers/exhibits are returned:
(2) Volumes

Sincerely,

CHARLES R. FULBRUGE III, Clerk

By: /s/ Timothy D. Beckstrom
Timothy D. Beckstrom, Deputy Clerk
504-310-7653

cc: (letter only)
Honorable Daniel E Knowles III
Ms Mary Schillesci McPherson
Mr Glenn Kenneth Schreiber

P.S. to Judge Knowles: A copy of the opinion was sent to your office via email the day it was filed.

MDT-1